Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

(2)

No. 96-1098

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN R. TOPP,

Petitioner,

v.

IDAHO STATE BAR,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Idaho

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL P. MCDONALD
MICHAEL E. ROSMAN
Center for Individual Rights
1233 20th Street, N.W.,
Suite 300
Washington, D.C. 20036
(202) 833-8400

ROBERT F. HOYT
Counsel of Record
ARNON D. SIEGEL
JAY V. PRABHU
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Amicus Curiae Center for Individual Rights

February 10, 1997

19 pp

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *GENTILE* PROHIBITS THE OVERBROAD APPLICATION OF RULE 8.2(a) TO PUNISH LAWYERS FOR SPEECH CRITICAL OF JUDGES OR THE JUDICIARY 3

II. LAWYERS MAY NOT BE DISCIPLINED UNDER RULE 8.2(a) IF THEY SPEAK WITHOUT CONSTITUTIONAL MALICE 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Brown v. Board of Education, 347 U.S. 483 (1954) 9

Butterworth v. Smith, 494 U.S. 624 (1990) 3

Committee on Legal Ethics v. Douglas,
370 S.E.2d 325 (W. Va. 1988),
cert. denied, 493 U.S. 964 (1989) 11

Garrison v. Louisiana, 379 U.S. 64 (1964) 2, 10, 11, 12

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991) 2, 3, 4, 6, 7, 8

In re Frerichs, 238 N.W.2d 764 (Iowa 1976) 6

In re Graham, 453 N.W.2d 313,
reinstatement ordered, 459 N.W.2d 706 (Minn.),
cert. denied, 498 U.S. 820 (1990) 6, 12

In re Hinds, 449 A.2d 483 (N.J. 1982) 6, 7

In re Holtzman, 577 N.E.2d 30 (N.Y.),
cert. denied, 502 U.S. 1009 (1991) 12

In re Kaiser, 759 P.2d 392 (Wash. 1988) 11

In re Primus, 436 U.S. 412 (1978) 3

In re Terry, 394 N.E.2d 94 (Ind. 1979),
cert. denied, 444 U.S. 1077 (1980) 12

In re Westfall, 808 S.W.2d 829 (Mo.), *cert. denied*, 502 U.S. 1009 (1991) 4, 5, 12

Louisiana State Bar Association v. Karst, 428 So. 2d 406 (La. 1983) 12

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 10, 11, 12

Pickering v. Board of Education, 391 U.S. 563 (1968) 11, 12

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 2

Ramirez v. State Bar, 619 P.2d 399 (Cal. 1980) 11

Ramsey v. Board of Professional Responsibility, 771 S.W.2d 116 (Tenn.), *cert. denied*, 493 U.S. 917 (1989) 11

Roe v. Wade, 410 U.S. 113 (1973) 9

Romer v. Evans, 116 S. Ct. 1620 (1996) 9

Rosenberger v. University of Virginia, 115 S. Ct. 2510 (1995) 2

Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) 9

Standing Committee on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) 7, 8, 12

State v. Nelson, 504 P.2d 211 (Kan. 1972) 6

United States District Court v. Sandlin,
12 F.3d 861 (9th Cir. 1993) 12

ETHICS MATERIALS

Judicial Criticism, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) (1993) 5, 6

MODEL RULE OF PROFESSIONAL CONDUCT 8.2(a) 3, 4, 5, 10

MODEL RULE OF PROFESSIONAL CONDUCT 8.4(d) 3, 4

BOOKS, TREATISES, AND ARTICLES

Esther Berkowitz-Cabellero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494 (1993) 6

Elizabeth A. Bridge, *Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express Their Views?: Matter of Westfall*, 57 MO. L. REV. 699 (1992) 11

Jeanne D. Dodd, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. KY. L. REV. 129 (1988) 6

Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799 (1991) 8, 9

Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981 (1992) 8

Geoffrey C. Hazard & W. William Hodes, 2 THE LAW OF LAWYERING § 8.2:201 (1985 & Supp. 1996) 7

Carol T. Rieger, *Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?*, 2 CONST. COMMENT. 69 (1985) 6

Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357 (1995) 6

David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991) 9

Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) 9

Bernard Wolfman, et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235 (1973) 9

PERIODICALS

Lawyers Defend Judge Criticized by Dole, ASSOCIATED PRESS, Apr. 23, 1996 9

Restraint, please, SAN DIEGO UNION & TRIB., Aug. 11, 1984 9

Second Circuit Chief Judges Criticize Attacks on Judge Baer, N.Y.L.J., Mar. 29, 1996 9

Andrea Ford & Jim Newton, *Prosecutors Opt Not to Include Simpson Chase*, L.A. TIMES, Sept. 14, 1995 8

Stuart Pfeifer, *Lawyers Criticize Judge's Ng Ruling*, ORANGE COUNTY REG., Aug. 30, 1996 8

Leslie Scism, *Prudential Insurance Sales Litigation is Beset by Charges of Improper Conduct*, WALL ST. J., Dec. 10, 1996 8

No. 96-1098

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN R. TOPP,

Petitioner,

v.

IDAHO STATE BAR,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Idaho

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is submitted in support of the Petitioner, John R. Topp. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The Center for Individual Rights ("CIR") is a non-profit public interest law firm founded in 1989. Through its litigation activities, CIR seeks to advance respect for individual rights.

Many of the cases in which CIR has participated have involved the First Amendment. *E.g., Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). CIR believes that in recent years, governmental entities and courts have circumscribed fundamental First Amendment freedoms in the pursuit of less than compelling objectives. This case is another example of the government limiting speech on a matter of significant public interest, thereby chilling constitutionally protected expression.

SUMMARY OF ARGUMENT

This Court has already held that the First Amendment protects lawyers who criticize the judiciary and its officers. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Court held that lawyers have a constitutional right to criticize the judiciary, so long as it will not prejudice an ongoing legal proceeding. And in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that criticism of judges cannot be prosecuted as defamation unless the traditional prerequisites of a defamation claim, including constitutional malice, have been proved.

Surprisingly, many states have ignored these precedents when applying their disciplinary rules to lawyers. While some courts have followed the holdings of *Gentile* and *Garrison*, many others — including the Supreme Court of Idaho in this case — continue to interpret their ethical rules as prohibiting all judicial criticism and permitting the punishment of "defamatory" criticism without proof of constitutional malice. This Court should grant the petition for certiorari to resolve the splits among the state supreme courts and to reverse the pervasive chilling effect such decisions have had on political speech by lawyers.

ARGUMENT

I. *GENTILE* PROHIBITS THE OVERBROAD APPLICATION OF RULE 8.2(a) TO PUNISH LAWYERS FOR SPEECH CRITICAL OF JUDGES OR THE JUDICIARY

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Court held that the First Amendment prohibits states from punishing lawyers for speech critical of the judiciary, so long as there is no substantial likelihood that the speech will materially prejudice an adjudicative proceeding in which the lawyer is participating. *Id.* at 1075. *Gentile* reaffirmed two core constitutional principles: that "speech critical of the exercise of the State's power lies at the very center of the First Amendment," *id.* at 1034 (opinion of Kennedy, J.), and that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment," *id.* at 1054 (opinion of Kennedy, J.). *See also Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *In re Primus*, 436 U.S. 412, 421-26 (1978).

Notwithstanding *Gentile*, many states have continued to apply their disciplinary rules to punish lawyers whose sole "offense" is to speak critically of public officials and their conduct in office. These jurisdictions have perfunctorily obeyed the holding of *Gentile* and have not punished this type of political speech under rules prohibiting conduct "prejudicial to the administration of justice." *See* MODEL RULE OF PROFESSIONAL CONDUCT 8.4(d).[1/] Instead, they have applied their counterparts of Model Rule 8.2(a),

---

1/ Model Rule 8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." The disciplinary rule at issue in *Gentile* was substantially similar: "A lawyer shall not make an extrajudicial statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile*, 501 U.S. at 1060-61 (*quoting* NEV. SUP. CT. R. 177(1) (1991)).

which prohibits lawyers from making statements that are defamatory of judges,[2/] to achieve precisely the same result. *See, e.g., In re Westfall*, 808 S.W.2d 829, 839 (Mo.) (en banc) ("The charges brought under Rule 8.4 are encompassed within the violation of Rule 8.2(a) in this case and, for purposes of imposition of discipline, cannot be distinguished."), *cert. denied*, 502 U.S. 1009 (1991). The Idaho State Bar's reprimand of Petitioner for characterizing a court's ruling as motivated by "political ramifications," *see* Petitioner's App. A5, is but one of those many cases.

The Idaho Supreme Court's application of Rule 8.2(a) in this case is plainly inconsistent with this Court's reasoning in *Gentile*. There can be no question that what is at issue here is classic political speech, critical of the government and its officers. *See Gentile*, 501 U.S. at 1034-35. The Petitioner was sanctioned simply for suggesting that an elected judge's decision on a controversial issue appeared to have been influenced by "the political ramifications" of the case. (*See* Petitioner's App. A5.) This type of general criticism of judicial decisions — commonplace in legal reporting, academia, and dissenting opinions — is well within the category of speech protected by *Gentile*. And yet the Idaho Supreme Court has sought to silence general criticism by characterizing Petitioner's speech as a

---

2/ Model Rule 8.2(a) provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." Twenty-nine states, in addition to Idaho, have adopted a rule of professional conduct with language identical to that of Model Rule 8.2(a): Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming. An additional eleven states have adopted substantially similar rules: Colorado, Florida, Hawaii, Massachusetts, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, and Washington.

defamatory statement concerning a judge, and thus proscribable under Rule 8.2(a).

Unfortunately, Idaho's use of Rule 8.2(a) as a tool for chilling critics of its judiciary is hardly unique. Enough states have followed this expansion of the rule that even the American Bar Association's *Lawyers Manual on Professional Conduct* casually observes that "[d]espite the express provisions of the Rules and Code, which prohibit only false criticism of the judiciary, courts have traditionally interpreted these standards . . . as restricting all lawyer criticism, whether false or not." *Judicial Criticism*, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 101:602 (1993). For example, Missouri lawyer George E. Westfall was sanctioned for criticizing a court's decision as illogical and result-oriented. *Westfall*, 808 S.W.2d at 839. Mr. Westfall had stated:

> [B]ut for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes. . . . And that, to me, really means he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

Id. at 831-32. Many states have adopted comparable interpretations of their ethical guidelines.[3/] Others, however, have rejected such broad limitations on lawyer speech. For example, the New Jersey Supreme Court held in *In re Hinds*, 449 A.2d 483 (N.J. 1982), that an attorney who is not "involved in a pending

---

[3/] *See, e.g., In re Graham*, 453 N.W.2d 313, 321 (Minn.) (per curiam), *reinstatement ordered*, 459 N.W.2d 706, *cert. denied*, 498 U.S. 820 (1990); *In re Frerichs*, 238 N.W.2d 764, 767-68 (Iowa 1976) (en banc); *State v. Nelson*, 504 P.2d 211, 214-16 (Kan. 1972) (per curiam); *see also* LAWS. MAN. ON PROF. CONDUCT at 101:601 ("Many courts have interpreted the ethical publication against false statements as also restricting judicial criticism in general.").

criminal matter" and criticizes the presiding judge may not be disciplined absent a " 'clear and present danger' . . . to the fairness and integrity of the judicial system." *Id.* at 498-99.

Application of a disciplinary rule to prohibit general criticism of the judiciary was precisely the principle rejected by the Court in *Gentile*. The same result is no more permissible when achieved by interpreting a different disciplinary rule. Under the reasoning of *Gentile*, any state-imposed prohibition on general criticism of the judiciary by lawyers is unconstitutional unless there is a "substantial likelihood of material prejudice" to the administration of justice. *See Gentile*, 501 U.S. at 1075.

Idaho's punishment of Petitioner cannot survive *Gentile*.[4/] Petitioner had not served as counsel in the case on which he commented, and the case was not pending before the court when Petitioner uttered his criticism. (Petitioner's App. A2.) As the Ninth Circuit concluded in *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), restrictions on a lawyer's speech are difficult to justify when there is no case pending before the court:

> When lawyers speak out on matters unconnected to a pending case, there is no direct and immediate impact on the fair trial rights of litigants. Information the lawyers impart will not be viewed

---

[4/] Indeed, commentators have noted that state bar associations are rarely able to justify their disciplinary rules on speech. *See, e.g.*, Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 358 (1995); Esther Berkowitz-Cabellero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 524-537 (1993); Jeanne D. Dodd, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. KY. L. REV. 129, 143-146 (1988); Carol T. Rieger, *Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?*, 2 CONST. COMMENT. 69, 85-87 (1985).

> as coming from confidential sources, and will not have a direct impact on a particular jury venire. Moreover, a speech restriction that is not bounded by a particular trial or other judicial proceeding does far more than merely postpone speech; it permanently inhibits what lawyers may say about the court and its judges — whether their statements are true or false.

Id. at 1443.[5/] The Ninth Circuit also recognized the dangers that would ensue if the protections recognized in *Gentile* were undermined:

> Much speech of public importance — such as testimony at congressional hearings regarding the temperament and competence of judicial nominees — would be permanently chilled if the rule in *Gentile* were extended beyond the confines of a pending matter.

Id. That observation is hardly exaggerated. The speech for which Petitioner was punished is indistinguishable from that uttered each day by lawyers speaking in the media,[6/] by lawyers who file

---

[5/] *Accord Hinds*, 449 A.2d at 498-99 ("An attorney with no supervening professional responsibilities in a pending criminal case would seemingly enjoy the same free speech rights as any other citizen."); *see also* 2 Geoffrey C. Hazard & W. William Hodes, THE LAW OF LAWYERING § 8.2:201, at 934 (1985 & Supp. 1996) ("Plainly an uninvolved lawyer . . . who attacks a judge or a court decision in a public forum should not be subject to more restrictions than an ordinary citizen, merely because he happens to be a lawyer.").

[6/] For example, Los Angeles District Attorney Gil Garcetti, in the course of the criminal trial against O.J. Simpson, made several criticisms of Judge Lance Ito:

> The way the prosecution has been treated in this case is simply unacceptable. . . . I am sick and tired . . . of this judge not treating the

motions criticizing judges,[7/] by lawyers in academia,[8/] by lawyers

---

> prosecution fairly. The defense gets away with murder. . . . [T]here just isn't any legal basis for what he did. . . . He overstepped all legal grounds.

Andrea Ford & Jim Newton, *Prosecutors Opt Not to Include Simpson Chase*, L.A. TIMES, Sept. 14, 1995, at A1, A17. In another California case, a lawyer criticized a Superior Court judge's decision to remove the Orange County Public Defender's Office from participation in the defense of a serial-murder suspect as motivated by the judge's dislike of a particular Deputy Public Defender: " 'The court was not only openly biased against [the Deputy], it acted on that bias in granting [the suspect]'s request in order to punish his counsel.' " Stuart Pfeifer, *Lawyers Criticize Judge's Ng Ruling*, ORANGE COUNTY REG., Aug. 30, 1996, at B1, *available in* 1996 WL 7045609.

7/ For example, lawyers in one case accused U.S. District Judge Alfred Wolin of engaging in "'increasingly injudicious behavior' showing a bias toward [a proposed settlement] in violation of a duty to remain impartial." Leslie Scism, *Prudential Insurance Sales Litigation is Beset by Charges of Improper Conduct*, WALL ST. J., Dec. 10, 1996, at B10.

8/ Members of this Court, past and present, have had their motivations questioned by academics. For example, scholars have suggested that Justice Scalia's opinions are motivated by a desire to reach conservative results in particular cases. *See, e.g.*, Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1032-34 (1992); Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1800 (1991); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1715 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1098 (1990). Justice Douglas had his motivation in tax cases questioned by another group of scholars. *See* Bernard Wolfman et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235, 276 (1973).

in the executive and legislative branches,[9/] and even by judges.[10/]

Some of the most significant decisions rendered by this Court have been criticized by lawyers, scholars, and judges as motivated more by the "political ramifications" than the merits. *See, e.g.*, *Romer v. Evans*, 116 S. Ct. 1620 (1996); *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Such criticism may be unsavory and undeserved. Nevertheless, chilling such speech as the Idaho Supreme Court has done offends the core values of the First Amendment

II. LAWYERS MAY NOT BE DISCIPLINED UNDER RULE 8.2(a) IF THEY SPEAK WITHOUT CONSTITUTIONAL MALICE

The Idaho Supreme Court has substantially ignored the standards set forth in this Court's decisions in *New York Times*

9/ Both President Clinton and then-Senate Majority Leader Dole criticized U.S. District Judge Harold Baer, Jr. for his rulings in recent cases. *See Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L. J., Mar. 29, 1996, at 4. Senator Dole also has criticized particular federal judges for being "an all-star team of liberal leniency" and suggesting that several of them should be in a "hall of shame." *See Lawyers Defend Judge Criticized by Dole*, ASSOCIATED PRESS, Apr. 23, 1996, *available in* 1996 WL 5378866.

10/ Justice Stevens, for example, has criticized the motivations of various members of this Court, accusing them of engaging in "'enthusiastic attempts to codify the law instead of merely performing the judicial task of deciding the cases that come before them.'" *Restraint, please*, SAN DIEGO UNION & TRIB., Aug. 11, 1984, at B8. Similarly, in *Romer v. Evans*, 116 S. Ct. 1620 (1996), Justice Scalia's dissent, which was joined by Chief Justice Rehnquist and Justice Thomas, suggested that the majority's invalidation of a state constitutional amendment was an act "not of judicial judgment, but of political will." *Id.* at 1637.

Co. v. Sullivan, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964). These cases stand for the proposition that a person cannot be sued or punished for defamation of a public official unless all of the prerequisites of a civil defamation claim, including constitutional malice, have been shown. *New York Times*, 376 U.S. at 279-80; *Garrison*, 379 U.S. at 67-68. Idaho's reprimand of Petitioner — a punitive sanction for a supposedly defamatory statement of fact — does not meet that standard.

In *Garrison*, a district attorney was prosecuted for questioning the motives of a group of criminal court judges, when he suggested that their rulings "'raise[] interesting questions about the racketeer influences on our eight vacation-minded judges.'" *Id.* at 64-66. On review of Garrison's bench trial conviction for criminal libel, the Court, relying on *New York Times*, reversed the state's criminal sanction and rejected the view that Garrison's statement was an attack on the personal integrity of the judges rather than their official conduct. *Id.* at 74-77.

The *Garrison* decision clarified that the constitutional limits on defamation actions are not lessened merely because the nature of the proceeding is punitive:

> Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.

Id. at 67. The Court reinforced that principle in *Pickering v. Board of Education*, 391 U.S. 563 (1968), where it held that the same limitations apply in administrative proceedings to discipline state employees who criticize the agencies they serve:

"[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Id.* at 574.

New York Times and its progeny have been interpreted by many courts as imposing the same constitutional limitations — constitutional malice, or scienter — on attorney discipline proceedings.[11/] Relying on the justification of protecting the "administration of justice," however, other courts have adopted a lower standard for attorney discipline cases, under which knowledge of falsity is not determined by the genuineness of a lawyer's belief in the truth, but rather by the *reasonableness* of that belief. *See Graham*, 453 N.W.2d at 321-22; *Westfall*, 808 S.W.2d at 836-37.[12/] These cases, which have applied an objective standard in attorney disciplinary proceedings, appear to contradict this Court's reasoning in *New York Times*, *Garrison*, and *Pickering*.

11/ *See, e.g., Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 121 (Tenn.), *cert. denied*, 493 U.S. 917 (1989); *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325, 332 (W. Va. 1988), *cert. denied*, 493 U.S. 964 (1989); *In re Kaiser*, 759 P.2d 392, 398 (Wash. 1988) (en banc); *Ramirez v. State Bar*, 619 P.2d 399, 404 (Cal. 1980) (en banc) (per curiam); Elizabeth A. Bridge, *Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express Their Views?: Matter of Westfall*, 57 MO. L. REV. 699, 722 (1992) (*citing* MODEL RULE OF PROF. CONDUCT 8.2 (Proposed Final Draft 1981)) ("The legal background of Model Rule 8.2 reveals that the drafters intended that a subjective standard would apply to the constitutional analysis. The drafters stated that the critical factors in the analysis were the statement's falsity and the individual's knowledge of the falsity at the time the statement was made.").

12/ *See also Yagman*, 55 F.3d at 1437; *United States Dist. Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993); *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y.) (per curiam), *cert. denied*, 502 U.S. 1009 (1991); *Louisiana State Bar Ass'n v. Karst*, 428 So. 2d 406, 409 (La. 1983); *In re Terry*, 394 N.E.2d 94, 95-96 (Ind. 1979) (per curiam), *cert. denied*, 444 U.S. 1077 (1980).

This Court should grant certiorari in this case to resolve the conflicts among numerous state and federal courts and to reaffirm the principles enunciated in *New York Times* and its progeny:

> [E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.

Garrison, 379 U.S. at 73.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL P. MCDONALD
MICHAEL E. ROSMAN
Center for Individual Rights
1233 20th Street, N.W.,
Suite 300
Washington, D.C. 20036
(202) 833-8400

ROBERT F. HOYT
Counsel of Record
ARNON D. SIEGEL
JAY V. PRABHU
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Amicus Curiae
Center for Individual Rights

February 10, 1997